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ARTICLE

The Odious Debt Doctrine: The Equitable Rule

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Abstract

The odious debt doctrine was envisaged by the Russian jurist Alexander Sack as an exception to the passing rule of a debt in case of state and government succession. An analysis of the practice indicates that this exception was often accompanied by some equitable solution. Although the 1983 Vienna Convention did not acknowledge the doctrine, the equitable distribution of assets and liabilities as a method of settling disputes may allow an application of the doctrine in disguise. This equitable method of settling could come into play if the doctrine found application beyond the strict boundaries of state succession. Such a step would imply the formalization of the doctrine in national legislation, with the result that a loan agreement tainted with odiousness would be illegal and unenforceable. Nevertheless, in common law countries, the laws of which usually govern financial transactions, a claim for recovering what transferred under an illegal contract could be denied based on public policy considerations. This denial of restitution would refrain these countries, traditionally sensitive to creditors' rights, from acknowledging the doctrine in their legal systems. To overcome this impasse, the formalization of the doctrine should include an equitable approach based on the benefit for the population. This equitable approach would reflect the practice of state and government succession on which the doctrine is usually grounded.

Keywords: Odious debt doctrine; equitable rule; doctrine's evolution; benefit for the population; methods of formalization

A. Introduction

In 1927, the Russian émigré Alexander Sack published a book entitled *Les Effets des Transformations des États sur Leur Dettes Publiques et Autres Obligations Financiers*,[1] in which he envisaged the existence of an "odious debt doctrine." Under this doctrine, a debt is odious for the population of the borrowing state when it is contracted by a despotic regime for the pursuit of purposes that, "*au su des créanciers*" (to the creditors' knowledge), are contrary to the interests of the population.[2] Because a loan contrary to the interests of the population can be regarded as an act hostile to the nation, lenders cannot rely on the passing of the debt in case of either state or government succession.[3]

However, there was no unanimous consent on the existence and operation of this doctrine. In his seminal work on state debt succession, Professor Ernst H. Feilchenfeld identified two potential instances of state succession in which the debt had not passed. These were the failed passing of the

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[1]*See* ALEXANDER N. SACK, LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEUR DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIERS 157–84 (1927).

[2]*See* SACK, *supra* note 1, at 157.

[3]*Id.* at 157 (describing how the number of debts contracted against the interest of the nation includes debt for buttressing a despotic regime and debt for repressing population).

Cuban debt to the U.S. in connection with the Spanish-American War[4] and the failed passing of the Prussian debt relating to the forced colonization of Polish lands under the Treaty of Versailles.[5] Nevertheless, in both cases, Feilchenfeld highlighted that there had been a benefit for the population.[6] With regard to this point, in his work on state succession, Professor Daniel O'Connell highlighted that the position of the U.S. commissioners during the negotiations for the peace treaty with Spain was influenced by doctrines relating to the self-determination of the American continent, while the non-passing to Poland of the debt incurred by Germany for the forced colonization of the Polish lands was justified on the basis of the intrinsic wrongfulness of that debt.[7]

The uncertain status of the doctrine is well reflected in the works for the Convention on the Succession of States in Respect of Matters Other than Treaties.[8] The Special Rapporteur for that Convention, Professor Mohammed Bedjaoui, emphasized that the term "odious debt" embraced two species of debt: War debt and subjugation debt.[9] In terms of war debt, the Special Rapporteur noticed that the rule of non-passing debt included some exceptions. Among them, he reported the case of Czechoslovakia which, following the end the First World War, decided to assume 33 per cent of the Austrian war debt for political reasons.[10] In terms of subjugation debt, the Special Rapporteur, further to the above mentioned cases of the Cuban debt and the debt incurred for the colonization of the Polish lands, referred to the case of Indonesia: In 1949, during the negotiations leading to its independence, Indonesia refused at first to assume certain debts contracted by the Netherlands for financing military operations against national liberation movements, even though, in the end, it accepted to assume a certain portion of them.[11] This lack of conclusive practice led to the exclusion of any reference to the odious debt doctrine from the final text of the 1983 Vienna Convention.[12] Article 33 of the Convention simply stipulates that "state debt" means any financial obligation of a predecessor state arising in conformity with international law toward another state, an international organization, or any other subject of international law.

The doctrine remained dormant until the beginning of the new millennium, when the Jubilee Campaign for debt reduction and the settlement of the Iraqi debt following the second Gulf War triggered a debate on its operation beyond the boundaries of state or government succession.[13] The

[4] *See infra* Section B.I.

[5] *See* Treaty of Peace with Germany (Treaty of Versailles), art. 255, June 28, 1919, 1919 U.S.T. 7 [hereinafter Treaty of Versailles].

[6] In terms of Cuban debt, Feilchenfeld emphasized that part of the debt was used to meet regular expenses. As for Prussian debt, he emphasized that the Polish landowners were compensated in full. In either case, the diversion from the maintenance rule was based on moral arguments. *See* ERNST H. FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION 340–41 (1931).

[7] *See* DANIEL P. O'CONNELL, THE LAW OF STATE SUCCESSION 188–89 (1956) (emphasizing the political characterization of these approaches).

[8] *See* Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, U.N. Doc. A/CONF.117/15 (Vol. II), (Apr. 8, 1983). *See also* MALCOLM N. SHAW, INTERNATIONAL LAW 986 (6th ed. 2008). ("The Vienna Convention is not yet in force. However, most of its norms—apart from those concerning newly independent states—reflect customary law.").

[9] Mohammed Bedjaoui (Special Rapporteur on the Convention of Succession of States in Matters Other than Treaties), *Ninth Rep. on Succession of States in Matters Other than Treaties*, *reprinted in* [1977] 1 Y.B. Int'l L. Comm'n 45, U.N. Doc. A/CN.4/301/1977/Add.1 [hereinafter Bedjaoui Report].

[10] *Id.* at 71.

[11] *Id.* at 73–74. This departure from the non-passing rule in case of subjugation debts was made for compromise. In 1956, however, the Indonesian government denounced the 1949 agreement.

[12] Discussing the text of the Convention, the International Law Commission found that rules formulated for each type of succession of states might well settle the issues raised by the odious debt doctrine. Therefore, it decided not to acknowledge the proposal of Professor Bedjaoui in the final draft of the Convention. *See Succession of States in Respect of Matters Other than Treaties*, [1981] 2 Y.B. Int'l L. Comm'n 79, U.N. Doc. A/CN.4/SER.A/1981/Add.1.

[13] Currently, the policy-oriented doctrines question the traditional Westphalian approach under which state succession is different from government succession. Under the Westphalian approach, when a government fails, the state remains responsible for its international obligations. The issue of state succession occurs only when the legal entity of the state itself changes. Nevertheless, this Westphalian distinction between states and governments fails to account for contemporary

outcome of this debate was that the doctrine would be applicable to every loan irrespective of any state or government succession. This application presupposes a formalization and an acknowledgment in national legislations, with the result that a loan contract tainted with odiousness would be illegal. Under an illegal loan contract, a claim for restitution of the money lent could be denied on the grounds of public policy. A denial of restitution would have a double effect. On the one hand, the borrowing state could apply in full the resources earmarked for the repayment to social expenditure. On the other hand, the lenders would incur a loss that must be set off. An equitable approach could strike a balance between the interests at stake.

Against this background, the purpose of this work is to demonstrate that an equitable approach is embedded in the traditional domain of the odious debt doctrine and, reasonably, should also be included in the formalization of the doctrine in national legislations. Section B of this article analyzes the practice of state and government succession to establish that the odious debt doctrine was often applied in association with an equitable arrangement. This equitable arrangement took place in the case of both the Cuban debt and the Tinoco loans. In terms of the Cuban debt, the non-passing of the debt incurred by the Spanish Crown was financially compensated by the forcible purchase of the Philippines by the United States. In terms of the Tinoco loans, the equitable award provided for exchanging the bills of credit of the lenders for the title in estates worthy half of the claim mortgaged by the Costa Rican government. Even though the 1983 Vienna Convention failed to include the doctrine in its final text, the inclusion of an equitable method relating to the distribution of assets and liabilities applies the doctrine in disguised form. Section C illustrates how the doctrine has undergone an evolutionary process under which it has started being invoked beyond the traditional domain of state succession and with reference to any kind of debt. This evolution reflects the view that morality and ethics would require that an odious debt should not be repaid in full. However, to be invoked in court, the doctrine must undergo a formalization process at the national level under which a loan contract tainted with odiousness is invalid and unenforceable. This work highlights that in common law jurisdictions a claim for the restitution of the money lent can be denied on the ground of public policy. The result is that common law countries, traditionally sensitive to the interests of the lenders, would be deterred from formalizing and acknowledging the doctrine in their legal systems. To overcome this problem, the solution could be to complement the formalization of the doctrine with an equitable rule based on an objective criterion—the benefit for the population—to determine the amount to be repaid. On this trail, Section D examines the international methods of formalization of the doctrine: An international convention, a model law, a soft law instrument, or a declaration of principles. Mostly, they consist of non-binding instruments designed to stimulate national legislators to include in their domestic legal systems the odious debt doctrine together with the equitable rule.

B. The Equitable Approach

In the context of state debt succession, the equitable approach has gradually come to light as a method for settling the issue of passing a debt because of the impossibility of converging on a binding rule.[14] Several theories have emerged to deal with this issue, none of which has gained wide acceptance. The theory of universal succession is based on an analogy with the theory of universal succession in private law. In this respect, the successor state occupies the same place in the community of nations as an heir does in the community of citizens and inherits the obligations

government successions in which international commercial arrangements are questioned and ultimately adjusted or terminated. In this context, international commercial arrangements should be adjusted whenever a state's internal structures are fundamentally changed. *See* Tai-Heng Cheng, *Why New States Accepts Old Obligations*, U. ILL. L. REV. 1, 6 (2011).

[14]The difficulty in formalizing a binding rule relating to succession in state debt emerged from the works of the Peace Conference following the First World War, where all the competing theories were finally set aside, and solutions were found on empirical bases. *See* Michael Hoeflich, *Through a Glass Darkly: Reflections on the Hist. of Pub. Int'l L. on Pub. Debt in Connection with State Succession*, U. ILL. L. REV. 39, 61 (1982).

of the antecessor state.[15] In a similar vein, the theory of the identity of the state is based on the continuity of the population despite any institutional change. This continuity ensures a regular discharge of obligations.[16] By contrast, the negative theory denies any passing of obligations. This theory originates from the notion of the absolute independence of the sovereign power, under which the obligations of the antecessor states are personal obligations and, as such, should not pass to the successor state.[17] A further theory, the modern theory, contests the theories described above and proposes an alternative view based on the theory of unjust enrichment or acquired rights. Under this theory, the obligation to repay the debt does not come so much from the continuity of the state, but rather from the obligation to respect creditors' rights.[18]

However, the practice of state debt succession has often diverged from these theories. This is particularly true with reference to the Anglo-Saxon practice which, on the one hand, has introduced a moral argument to block the passing of the debt and, on the other, has devised the expediency principle permitting the repayment of a debt on the basis of the circumstances of the case.[19] This principle was formalized by Arthur Berriedale Keith in his seminal work *The Theory of State Succession*, where he highlighted that expediency naturally produces different results under different circumstances.[20] This is because expediency does not constitute a proper binding rule in terms of state debt succession. Rather, it provides a method for settling the issue. In this context, lenders are called to "look to diplomatic as much as political, economic and legal solutions."[21]

I. The Equitable Approach and the Odious Debt Doctrine

A thorough analysis of the cases of state and government succession on which the odious debt doctrine has been traditionally based reveals that the non-passing of the debt has often been associated, in various ways, with some equitable settlement. This equitable settlement has not been regarded as a constitutive element of the doctrine but has remained a method of settling disputes. Nevertheless, it has recurrently accompanied the doctrine and may be considered as an embedded element.

1. The Practice of State Succession

The practice of state succession in terms of odious indebtedness may offer some guidance towards equitable solutions. In this context, it is necessary to draw a distinction between cession and annexation, as in the first case the debtor state continues to exist, while in the second case it is dissolved.[22] With reference to cession, the most striking instance concerns the controversy surrounding the Cuban debt following the Spanish-American War in 1898.[23] Towards the end of the

[15] *See* O'Connell, *supra* note 7, at 6–8.

[16] Under this theory, the substance of the state would coincide with its population. Hoeflich, *supra* note 14, at 43.

[17] *See* O'Connell, *supra* note 7, at 8. *See also* James L. Foorman & Michael E. Jehle, *Effects of State Succession and Gov't Succession on Com. Bank Loans to Sovereign Borrowers*, U. Ill. L. Rev. 1, 12 (1982).

[18] *See* Daniel P. O'Connell, *Secured and Unsecured Debts in the Law of State Succession*, 28 Brit. Y.B. Int'l L. 204 (1951).

[19] *See* Hoeflich, *supra* note 14, at 55–56.

[20] *See generally* Arthur B. Keith, The Theory of State Succession, with Special Reference to English and Colonial Law (1907).

[21] *Id.* at 62. Keith continues:

> In peace cessions of territory are naturally accompanied by the taking over of part of the debt of the ceding state; on the other hand cessions forced by war are naturally not accompanied by any such taking over as was the case in 1871 [France-Germany] and 1898 [Spain-U.S.], or at best only a small part of the debt is taken over, as in 1859 [Austria-France] and 1866 [Austria-Prussia]. *Id.*

[22] *See* O'Connell, *supra* note 7, at 16–26, 31–32.

[23] The Spanish-American War ended Spain's colonial empire in the Western Hemisphere and secured the position of the United States as a Pacific power. Following the U.S. victory, Spain was obliged to relinquish her sovereignty over Cuba and to cede sovereignty over Guam, Puerto Rico, and the Philippines to the United States. *See generally* Alan Keller, The Spanish-American War: A Compact History (1969).

nineteenth century, the Spanish Crown had issued bonded loans secured by certain fiscal revenues of Cuba, the proceeds of which were used to suppress the struggle for the independence of the island.[24] During the peace negotiations following the defeat of Spain, the U.S. delegation successfully pleaded the argument of the non-transferability of the debts incurred by the Spanish Crown, arguing that they were not contracted in the interest of the Cuban population. Although not all the debts had been contracted for "odious purposes,"[25] the American delegation insisted that "[t]he decrees of the Spanish Government itself show that these debts were incurred in the fruitless endeavors of Government to suppress the aspirations of the Cuban people for greater liberty and freer Government."[26] Although the arguments of the U.S. delegation were based more on moral justification than on legal assertions,[27] they were eventually acknowledged in the Treaty of Paris, signed in 1898.[28] However, the rule of maintenance of the debt was preserved by having recourse to a loophole. Cuba was not ceded to the U.S., but simply "relinquished" by the Spanish Crown with the result that the Cuban debt did not pass.[29] From a substantive point of view, the Cuban debt consisted of various loans issued prior to 1880 and subsequently converted into consolidated loans. Further to being secured by certain Cuban revenues, they were guaranteed by the Spanish Crown.[30] Therefore, the rights of the bondholders did not vanish, as they remained with the Spanish Crown as guarantor.[31] However, the refusal of the United States to assume the burden of the Cuban debt must be appreciated within a wider financial context. As part of the treaty of peace, the non-assumption of the Cuban debt was accompanied by the payment of $20 million in exchange for the cession of the Philippines.[32] Subsequently, the U.S. paid a further $100,000 against the cession of certain islets belonging to the Philippines that had not been included in the treaty of peace.[33] This picture indicates that the bonded debt was not repudiated but remained with the guarantor, who received some form of disguised compensation for the failed transfer of the debt.

With reference to annexation, the most striking example is the fate of the debts contracted by the Boer Republics to finance the war against the United Kingdom during the Second Boer War from 1899 to 1902.[34] At the time of the annexation of the defeated Boer Republics, the United Kingdom declared that it would not assume those debts, as the relevant proceeds had been applied

[24]*See* FEILCHENFELD, *supra* note 6, at 329–43.

[25]*Id.* at 339–40.

[26]*See* JOHN B. MOORE, A DIGEST OF INTERNATIONAL LAW 377 (1906). Spain made an offer to submit the Cuban debt to arbitration to ascertain what portion the United States would have been accountable for debts incurred for Cuban improvements. The Spanish offer was referred to the U.S. President, William McKinley, who dismissed it. *See* Sarah Ludington, Mitu Gulati & Alfred L. Brophy, *Applied Legal Hist.: Demystifying the Doctrine of Odious Debts*, 11 THEORETICAL INQUIRIES L. 247, 255–56 (2010).

[27]*See* Hoeflich, *supra* note 14, at 54.

[28]*See generally* Treaty of Peace between the United States of America and the Kingdom of Spain (Treaty of Paris), Spain-U.S., Dec. 10, 1898, 30 Stat. 1754 [hereinafter Treaty of Paris].

[29]"Spain relinquishes all claim of sovereignty over and title to Cuba", art. I, Treaty of Paris. This is in contrast with the case of Puerto Rico, which explicitly formed the object of a cession. *Id.* at art. II ("Spain cedes to the United States the island of Porto Rico [sic]."). *See also* SACK, *supra* note 1, at 143–44. In this way, the debt did not pass either to the United States, as the possession of the island was acquired *a non-domino*, or to Cuba, as it was already occupied by U.S. troops and so deprived of sovereignty.

[30]*See* FEILCHENFELD, *supra* note 6, at 333–34.

[31]*Id.* at 342 (explaining that the bonded loans were assisted by two securities: A primary security on the Cuban revenues and a secondary guarantee by the Spanish Crown).

[32]"Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line (. . .). The United States will pay to Spain the sum of twenty million dollars ($20,000,000) within three months after the exchange of the ratifications of the present treaty," art. III, Treaty of Paris.

[33]*Treaty Between the United States and Spain for the Cession to the United States of Any and All Islands of the Philippine Archipelago Lying Outside of the Lines Described in Article III of the Treaty of Peace of December 10, 1898*, *in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 887–88 (1900) [hereinafter Treaty of Washington]; *see also* FEILCHENFELD, *supra* note 6, at 343 n.83.

[34]*See generally* BILL NASSON, THE WAR FOR SOUTH AFRICA: THE ANGLO-BOER WAR (1899–1902) (2011) (explaining that the Second Boer War—also known as the Boer War, the Anglo-Boer War, or the South African War—was fought between the British Empire and two independent Boer states, the South African Republic and the Orange Free State. After long and difficult

to fund the war.[35] This position was consistent with the rule of the non-passing of debt contracted by a defeated enemy for war purposes.[36] However, it marked a difference from the approach followed by the United Kingdom in the context of the annexation of the Transvaal in 1877,[37] where the payment of the debt of the annexed country had been solemnly pledged.[38] The rigidity of the declaration of the British authorities was tempered in the 1902 Treaty of Vereeniging between the United Kingdom and the Boer Republics.[39] Under Article 10, a judicial commission was appointed with the purpose of relieving the Boer people from the war losses, including notes issued under the war loans. These notes would have been regarded as evidence of war losses of the original holders if they had been issued in return for valuable considerations. However, payments on the notes did not exceed two shillings on the pound.[40] With respect to this, the treaty of peace did not discontinue the rule of the non-passing of the debt contracted by a defeated enemy but mitigated the previous repudiation and provided some form of compensation.

In a similar vein, following the "*Anschluss*" of Austria by Germany in 1938,[41] the German Reich refused to assume the Austrian bonded loans issued in 1923 and 1932. These were loans organized by the League of Nations at the request of the Austrian Government and backed by the guarantee of certain member states of the League with the purpose of restoring the economic and financial conditions of Austria. The League's intervention was economic in character,[42] while the participation of the guarantor states was driven by the political intent of keeping Austria separated from Germany.[43] In force of Article 88 of the Treaty of Peace between the Allied Powers and Austria, Austria was deprived of the power to alienate its independence without the consent of the Council of the League of Nations.[44] This undertaking was restated by Austria in connection with the two League Loans: Explicitly in Protocol No. 1 for Economic and Financial Assistance to Austria of 1922,[45] and implicitly in the Austrian

fights, the British troops prevailed, and the independence of the Orange Free State and the South African Republic was put to an end).

[35]Frederick Roberts, *Proclamations Issued by Field-Marshal Lord Roberts in South Africa*, 1900 [Cd.] 426, at 8–9 (UK) ("Her Majesty's Government will refuse to honour such a promissory note that may be hereafter presented for payment and expressly repudiate all liability in respect of them whatsoever.").

[36]*See* FEILCHENFELD, *supra* note 6, at 445–46 (providing examples where a successor is not liable for loans that a predecessor took out for the purposes of funding warfare).

[37]*See generally* JOHN LABAND, THE TRANSVAAL REBELLION: THE FIRST BOER WAR 1880–1881 (2014).

[38]*See generally British Proclamation Annexing the Transvaal Republic*, *in* 54 BRITISH & FOREIGN STATE PAPERS 140–45 (1877). That approach was driven by the necessity to appease the political unrest in South Africa caused by the annexation of Transvaal. In that case, the United Kingdom applied a rule of expediency. *See also* KEITH, *supra* note 20, at 64–65.

[39]*See* Agreement between Great Britain and the Orange Free State and the South African Republic as to the Terms of Surrender of the Boer Forces in the Field, May 31, 1902, 191 C.T.S. 232 [hereinafter Treaty of Vereeniging]; s*ee also* 95 BRITISH & FOREIGN STATES PAPERS 160 (1902).

[40]*See* KEITH, *supra* note 20, at 65. The Commission was endowed with three million pounds to face all the claims. *Id.*

[41]*Anschluss* was the annexation of the Federal State of Austria into the German Reich on March 13, 1938. The idea of an *Anschluss*—a united Austria and Germany that would form a "Greater Germany"—had already emerged following the unification of Germany in 1871. *See* generally JÜRGEN GEHL, AUSTRIA, GERMANY, AND THE ANSCHLUSS, 1931–1938 (1963) and Herbert Wright, *The Legality of the Annexation of Austria by Germany*, 38 AM. J. INT'L L. 621 (1944).

[42]*See* EDWIN M. BORCHARD, STATE INSOLVENCY AND FOREIGN BONDHOLDERS: GENERAL PRINCIPLES 297 (1951).

[43]Although the financial arrangements were made with the purpose of meeting the objective necessities of the population, the guarantor states, including Belgium, France, and Italy, had the political intent to preserve the territorial integrity of Austria. *See* OLIVIER MOREAU-NÉRET, LES VALEURS MOBILIÈRES: TOME I 175 (1939).

[44]Treaty of Peace Between the Principal Allied and Associated Powers and Austria art. 88, Sept. 10, 1919, 226 C.T.S. 36 [hereinafter Treaty of Saint-Germain].

[45]The loan machinery consisted of three protocols on the restoration of Austria, *see* League of Nations Doc. C.716.M.428 1922 II (1922). The first Protocol was a political engagement between Austria and the guarantor Powers; the second Protocol was an undertaking by the guarantor Powers to submit to the respective parliaments the authorization to provide the guarantee; and the third Protocol was a declaration by Austria to the Council of the League and the guarantor Powers concerning the acceptance of a program of the economic reform. *See* Sir John F. Williams, *Financial Administration by the League*, *in* CHAPTERS ON CURRENT INTERNATIONAL LAW AND THE LEAGUE OF NATIONS 378, 390–95 (1929).

Protocol of 1932.[46] Because Germany considered this undertaking to be against the interest of the Austrian people, it refused to recognize any liability for the Austrian debt.[47] A number of states protested, both as the guarantor states of the loans and as the national states of the bondholders.[48] As a result of this protestation, the European states, including Great Britain, reached separate diplomatic settlements on the Austrian debt with Germany,[49] while the U.S. rejected the offer for an exchange *ex gratia* (as a matter of grace) of Austrian bonds. The issue of German liability for the Austrian loans dragged on until the end of the Second World War, when Germany accepted liability for the Austrian debts and Austria resumed payment on the bonds.[50]

2. The Practice of Government Succession

The practice of government succession also records instances in which the odious debt doctrine was invoked and an equitable solution was found. In terms of government succession, it is necessary to draw a distinction between the personal debt of the government and the personal debt of a particular class of citizens. With reference to the personal debt of a government, the most significant instance is the controversy over the Tinoco loan. The case concerned the validity of a loan contracted by Frederico Tinoco, President of Costa Rica, with the Royal Bank of Canada following the *coup d'état* of 1917. The sums provided under the loan contracted with the lender were used for the personal expenses of President Tinoco and his kinship. Because of this, the successor government refused to recognize the validity of the loan and the issue was submitted to arbitration, the so called Tinoco Arbitration.[51] The arbitration was instituted following a *compromis* between Costa Rica and Great Britain acting under diplomatic protection. In delivering the award, the Umpire Taft—the Chief Justice of the Supreme Court at that time—highlighted that the case of the Royal Bank of Canada was to be appreciated in light of the good faith in providing money for the real use of the Costa Rican government under the Tinoco presidency, which was roughly $200,000.[52] In this context, the Umpire found that the bank knew that the sums were for the personal use of President Tinoco and his brother, the Secretary of War. In relation to President Tinoco, the bank knew the sums were for his personal support after he had taken refuge in a foreign country. In the same vein, the bank knew that the sums provided to the brother of President Tinoco, as salary and expenses for four years to establish a legation in Italy, were for his personal use and not for legitimate government purposes. This was because, following the fall of President Tinoco, his brother could not reasonably expect to represent the Costa Rican government as ambassador to Italy. In both cases, the provision of money was simply meant to support refugees abroad.[53]

However, a compromise was also reached. The Umpire did not say that the loan agreements were invalid, nor did he hold that the Costa Rican government was entitled to repudiate the loans.

[46]Agreement for Guaranteeing a Further Loan to Austria, July 15, 1932, CXXXV L.N.T.S. 285 [hereinafter Austrian Protocol].

[47]However, a large part of the proceeds deriving from the loans were used to purchase food for the Austrian people. Foorman & Jehle, *supra* note 17, at 22.

[48]*See* O'Connell, *supra* note 7, at 152.

[49]The settlements concerned countries with which Germany had export surpluses from which funds could be drawn. Hoeflich, *supra* note 14, at 64.

[50]*See* Hoeflich, *supra* note 14, at 64–65.

[51]Aguilar-Armory & Royal Bank of Canada (U.K. v. Costa Rica), 1 R.I.A.A. 369, 371–99 (1923) [hereinafter Tinoco Arbitration].

[52]*Id.* at 394. Taft explained:

> The case of the Royal Bank depends not on the mere form of the transaction but upon the good faith of the bank in the payment of money for the real use of the Costa Rican government under the Tinoco regime. It must make out its case of actual furnishing of money to the Government for or its legitimate use. It has not done so. *Id.*

[53]*Id.*

He took an equitable route and concluded that there would be no injury to Great Britain if the Costa Rican government were to assign all its interest in the mortgage for $100,000 upon the estate of President Tinoco's brother.[54] Yet, this equitable route was not driven by equitable considerations; rather, it was driven by the fact the Costa Rican government had implicitly recognized the validity of the loans in raising the mortgage on the estates of the brother of President Tinoco. Upon executing the assignment and delivering the mortgage, the bank was to transfer to the government of Costa Rica the bills evidencing the whole claim, which was approximately $200,000. The subrogation of the Royal Bank of Canada to the title of Costa Rica in the mortgage was the condition for the equitable award.[55] An equitable solution was therefore also found in this case.

With reference to the personal debt of a class, the most significant instance is the settlement on the repudiation of the Tzarist debt. In 1918, in the aftermath of the October Revolution, the Bolshevist government repudiated the Czarist debt, invoking the rule of *mutatio regiminis* (change of government).[56] In the view of Lenin, peasants and workers should not have been required to pay the debt contracted by the gentry to fund a capitalist war.[57] Further, the proceeds of the loans were used to prevent insurrections by the Russian population.[58] This repudiation also marked a significant diversion from the practice of debt repayment in case of a radical change of government.[59] In the view of the Soviet authorities, this diversion was designed to spread and promote the October Revolution in western countries.[60] The repudiation mainly affected French holders[61] because the Russian bonds were issued on the French market as part of a strategy to cement the French-Russian alliance.[62] The Western powers, further to the repudiation of the bonded loans, complained about the nationalization of the properties of their nationals by the Bolshevist government. The Bolshevist government, in turn, claimed the payment of the damages and the restitution of gold given to Germany by Russia following the Brest-Litovsk armistice in 1918.[63] This

[54]Umpire Taft qualified this approach as an *aequo et bono* solution. *Id.* at 395.

[55]The Umpire clearly said that this solution was driven by his interest in settling the international dispute. *Id.* at 399.

[56]*See* Boris Mirkine-Guetzevitch, *La Doctrine Sovietique du Droit International*, 32 Revue Générale de Droit Int'l Pub. 313 (1925). Formally, Soviet authors adopted the conception of a revolutionary breaking of the continuity of the state; substantively, Soviet authors pleaded the argument of the *clausula rebus sic stantibus*. *See* Krystyna Marek, Identity and Continuity of States in Public International Law 44–45 (1954).

[57]Lenin made clear his disdain for Czarist debts:

> [The Soviet] would declare that the *capitalist gentry themselves* can repay the billions of debts contracted by the bourgeois Governments to wage this criminal, predatory war, and that the workers and peasants *refuse to recognize* these debts. To pay the interest on these loans would mean paying the capitalists *tribute* for many years for having graciously allowed the workers to kill one another in order that the capitalists might divide the spoils.

Vladimir Ilyich Lenin, *Letters from Afar: Fourth Letter—How to Achieve Peace*, *in* 23 Lenin: Collected Works (August 1916-March 1917), 333 (1964). *See* also Hassan Malik, Bankers and Bolsheviks 165 (2018) (emphasis in original).

[58]The 1906 loan was contracted without the consent of the Duma and part of the proceeds were used to prevent insurrections. *See* Stephanie Collet & Kim Oosterlink, *Denouncing Odious Debts*, 160 J. Bus. Ethics 205, 210 (2019).

[59]For example, revolutionary France kept payments current on the debt contracted by the Ancien Régime: "*Les rois avaient représenté la France; les dettes qu'ils avaient contractées étaient donc des dettes du Royaume elles engageaient l'Etat entier et, par consequent, tout gouvernement qui représenterait la France.*" ["The kings had represented France; the debts they had contracted were therefore debts of the Kingdom; they engaged the entire State and, consequently, any government which represented France."] *See* Alexander N. Sack, *La Succession aux Dettes Publiques d'Etats*, 23 Recueil des Cours 149, 257–58 (1928).

[60]*See* Malik, *supra* note 57, at 193–94.

[61]*See generally* Joel Freymond, Les Emprunts Russes: Histoire de la plus grande spoliation du siècle—de la ruine au remboursement (1996) (describing how this repudiation was subsequently stigmatized as "*la plus grande spoliation du siècle*").

[62]Although the bond issuance on the French markets involved serious risks connected to the economic and political situation of the issuer, the French government disregarded the point and supported the sale of Russian bonds among its nationals. *See* Sandra Szurek, *Mise en perspective de l'accord franco-russe*, *in* Les Emprunts Russes et le Règlement du Contentieux Financier Franco-Russe 7, 25–28 (Patrick Julliard & Brigitte Stern eds., 2002).

[63]*Id.* at 29–38. On the Treaty of Brest-Litovsk, *see* Judah Leon Magnes, Russia and Germany at Brest-Litovsk: a Documentary History of the Peace (1919).

gold was also claimed by the defaulted French bondholders as compensation for their loss.[64] There were many attempts to solve the *querelle*. At the 1922 Conference of Genoa,[65] no agreement was reached because of the divergent interests of the main national countries of the defaulted bondholders—Great Britain and France.[66] Bilateral attempts did not have better outcomes. In 1924, the governments of the United Kingdom and the Soviet Union signed an agreement including a lump sum for the British defaulted bondholders in exchange for a guarantee by the British government of a Soviet loan. Nevertheless, the agreement was never ratified.[67] In 1927, the Soviet government made an offer to the French government of a lump sum of 60 million French Francs in exchange for 600 million French Francs of commercial credits held by the French government. The negotiations were not crowned with success on this occasion, either.[68] The *querelle* dragged on for several decades until the end of the last century. In 1986, a first settlement was concluded between the Soviet and British governments.[69] In 1996, the Russian and French governments signed a lump sum agreement in the form of a memorandum under which Russia committed itself to disburse to France a lump sum of $400 million which France was to distribute among its national holders of Czarist bonds. In turn, France undertook not to espouse claims of its nationals against Russia that were dated prior to 1945. In this context, France established a consultative commission charged with identifying existing holders and the methods by which the sum might be distributed among them.[70] In this case, the lump sum constituted only one to two percent of what Russia should have provided as full compensation.[71] In this case, the equitable, but symbolic, settlement was imputable to the long period of time intercurrent from repudiation.

[64]*See* Treaty of Versailles, *supra* note 5. In the context of the Treaty of Versailles, the 94 tons of gold given by Russia to Germany in exchange for the retreat of the German troops from the Russian territory was regarded as German gold to indemnify the victorious powers. *Cf. id.* at art. 259. Of these 94 tons, 47 were given to Great Britain and 47 to France. The claim of the French holders was based on a speech of French Prime Minister Raymond Poincaré to the French Senate, when he declared that this gold was pledged to compensate the French holders of Russian bonds. Szurek, *supra* note 62, at 37.

[65]*See* Carole Fink, The Genoa Conference: European Diplomacy, 1921–1922 (1984) (explaining that the Genoa Economic and Financial Conference was a formal meeting of 34 nations held in Genoa, Italy, from April 10 to May 19, 1922, to resolve the major economic and political issues facing Europe, and to negotiate a relationship between European capitalist economies and the new Bolshevik regime in Russia).

[66]Great Britain was more interested in establishing a commercial *modus vivendi* with the Soviet Union, while France was more interested in protecting the claims of the 1,600,000 defaulted French bondholders. Szurek, *supra* note 62, at 45–46.

[67]*Id.* at 48 (describing how this agreement between the U.K. and Soviet Union was never ratified).

[68]Also in this case, negotiations came to no conclusion. *Id.* at 50. Considering the country's involvement in the issuance of Russian bonds on the French markets, France could have chosen a different route and reimbursed, at least in part, the French bondholders. This was what had occurred when Mexican president Benito Juárez repudiated the bonded loans issued by Emperor Maximilian on the French markets in 1867, and France indemnified its nationals who had purchased the securities to the extent of the half of the amount invested. The decision of the French government was justified by the support in establishing and financing Maximilian of Habsburg as Emperor of Mexico. *See* William H. Wynne, State Insolvency and Foreign Bondholders: Selected Case Histories of Governmental Foreign Bond Defaults and Debt Readjustments 27–30 (1951).

[69]The lump sum was constituted by gold that had been deposited by the Czar in the Barings Bank and frozen following the October Revolution. *See* Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics Concerning the Settlement of Mutual Financial and Property Claims, U.K.-U.S.S.R., art. 2(b), July 15, 1986, 9130 U.N.T.S. 638. *See also* Szurek, *supra* note 62, at 49.

[70]Holders could be compensated in two ways: Either by limiting compensation to the original holders and their heirs as victims of the Bolshevist repudiation, or by recognizing compensation indifferently to all the current holders of the bonds; the latter route was taken. *See* Anne Muxart, *Le système de mise en oeuvre législative et réglementaire du mémorandum d'accord franco-russe du 26 novembre 1996 relatif à l'indemnisation de Français spoliés ou dépossédes par l'-URSS*, *in* Les Emprunts Russes et le Règlement du Contentieux Financier Franco-Russe, 197, 229–41 (Patrick Julliard & Brigitte Stern eds., 2002).

[71]*See* Sandra Szurek, *Épilogue d'un contentiueux historique, in* 44 Annuaire français de droit international, 143, 154 (1998).

II. The 1983 Vienna Convention

At the state of the art, the odious debt doctrine has been neither acknowledged in the 1983 Vienna Convention nor formalized as a customary norm. In terms of the Vienna Convention, the proposal advanced by Professor Bedjaoui to insert the odious debt doctrine in the text of the Convention was not acknowledged by the delegates of the participating states. It is certainly true that the reference to "in conformity with international law" contained in Article 33 could operate as a Trojan horse for the odious debt doctrine.[72] Nevertheless, its significance would depend on the evolution of international law in this field. In terms of customary law, it is questionable that the doctrine has been reflected in a general and consistent practice of states.[73] On the one hand, the doctrine has never been invoked in the settlement of debts relating to the complex phenomenon of decolonization.[74] On the other hand, most of the scholars do not believe that odious debt doctrine has achieved the status of a customary norm.[75]

1. The Equitable Approach under the Convention

Irrespective of the legal status of the odious debt doctrine, the equitable approach has been confirmed as a method of settling disputes, both by the text of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, and by state practice. In terms of the Vienna Convention—specifically under Articles 37, 40, and 41—the general rule stipulates the passing of the debt to the successor state with a reduction to an equitable proportion in the cases of transfer of part of a state, secession, or dissolution.[76] In all these cases, the state debt of the predecessor state passes to the successor state in an equitable proportion, in particular taking into account the property, rights, and interests which pass to the successor state in relation to that state debt.[77] In this context, it is worth emphasizing that the Vienna Convention does not permit creditor states to impose the determination of equitable proportion upon successor states, although as it does permit creditor states to object to the determination of equitable proportion made by debtor states.[78] The equitable distribution of assets and liabilities combines the necessity to preserve creditors' rights with the self-determination of debtor states.[79]

In terms of practice, at least three situations can be identified under which some equitable settlement was arranged. In the case of the dissolution of the Czechoslovak federation, in 1992 the two successor states—the Czech Republic and Slovakia—agreed to divide the assets and liabilities

[72] *See* Rex J. Zedalis, Claims Against Iraqi Oil and Gas: Legal Considerations and Lessons Learned 42–43 (2010). *See also* Jeff King, The Doctrine of Odious Debt in International Law: A Restatement 60–61 (2016).

[73] Restatement (Third) of Foreign Rels. L. § 102(2) (1987).

[74] *See* Andrew Yianni & David Tinkler, *Is There a Recognized Legal Doctrine of Odious Debts*, 32 N.C. J. Int'l L. 749, 766–67 (2007).

[75] *See* Christoph G. Paulus, "*Odious Debts" vs. Debt Trap: A Realistic Help?*, 31 Brook. J. Int'l L. 83, 91 (2005) (noting that the doctrine of odious debts has not yet achieved the status of customary international law). *See also* Anna Gelpern, *Sovereign Debt Restructuring: What Iraq and Argentina Might Learn from Each Other*, 6 Chi. J. Int'l L. 391, 411 (2005).

[76] *See generally* Lee C. Buchheit, Secession: The Legitimacy of Self-Determination (1978) (explaining how the passing rule does not operate when the successor state is a newly independent state, unless an agreement between them provides otherwise in view of the link between the state debt of the predecessor state, connected with its activity in the territory to which the succession of states relates, and the property, rights, and interests which pass to the newly independent state). U.N. Conference on Succession of States in Respect of State Property, Archives, and Debts, *Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts*, art. 38, para. 1, U.N. Doc. A/CONF.117/16/Add.1 (Vol. II) (Apr. 8, 1983) [hereinafter Vienna Convention].

[77] *See* Eli Nathan, *The Vienna Convention in Respect of Succession of States in Respect of State Property, Archives, and Debts*, *in* International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne 489, 508–09 (Yoram Dinstein & Mala Tabory eds., 1989) (explaining the reference to an equitable apportionment was imputable to the lack of conclusive practice in this field).

[78] *See* Paul Williams & Jennifer Harris, *State Succession to Debts and Assets: The Mod. L. and Pol'y*, 42 Harv. Int'l L. J. 355, 365 (2001).

[79] *See* Tai-Heng Cheng, State Succession and Commercial Obligations 167–68 (2006).

of the predecessor state based on the territorial and population principles. The territorial debts remained with the state the territory of which related to those debts; the non-territorial debts were divided on a population ratio of two to one between the two successor states. The creditor states did not take part in the agreement between the two successor states, but accepted the method of allocating of the debt.[80] In the case of the dissolution of the Soviet Union, the dissolution of the federal Union of Socialist Soviet Republics and the subsequent creation of the Community of Independent States was accompanied by a memorandum of understanding under which the successor states accepted to be jointly and severally liable for all foreign debts of the former Soviet Union. Nevertheless, many foreign creditors—states and banks alike—found that this memorandum impaired their rights, as not all the successor states were deemed financially reliable. Some Western creditors declared that Russia was the heir of the Soviet Union and was thus bound by its debts. Substantively, Russia accepted this view and entered into a number of bilateral agreements with the other former Soviet republics under which it assumed all the liabilities of the Soviet Union in exchange for all the assets of the Soviet Union outside the territory of those republics.[81] In the case of the dissolution of the Federal Republic of Yugoslavia, things were even more complicated because of the armed conflict between the successor states.[82] As a result, the settlement was imposed by the creditor states. Most of the debts were local or localized debts and were apportioned according to the territorial principle. The remaining debts were apportioned under the same proportion as the successor states were held liable for the territorial debts.[83] The issue is that the Vienna Convention does not contain any criterion for the redistribution of assets and liabilities,[84] with the result that the equitable approach can assume many forms.

From the above, it can be easily inferred that the equitable approach is a general method of settlement in the context of state succession. This method can be applied to any phenomenon of state succession, including situations potentially falling in the purview of the odious debt doctrine. In this way, the operation of an equitable settlement would not depend on the formal qualification of the doctrine. The result is that in the domain of state succession, the odious debt doctrine may come into play in disguised form even without having achieved the status of an international law rule. The doctrine can be raised as a political argument in the context of the diplomatic negotiations and applied under the form of an equitable settlement of state debts.

C. The Evolution of the Doctrine and the Equitable Approach

Under the 1983 Vienna Convention, the doctrine may be applied in disguise. However, this disguised application would not work to the extent that the doctrine is invoked beyond the limited domain of state succession. Following the second Gulf War and the Jubilee Campaign, there was a strong pressure to make the doctrine applicable to any kind of indebtedness regardless of state or

[80] *See* Williams & Harris, *supra* note 78, at 411.

[81] *See* Stefan Oeter, *State Succession and the Struggle over Equity: Some Observations on the Laws of State Succession with Respect to State Property and Debts in Cases of Separation and Dissolution of States*, 38 GER. Y.B. INT'L L. 73, 77–83 (1995) (explaining that not all the former Soviet republics were satisfied with the settlement proposed by Russia: Ukraine disagreed, as it wanted a portion of the assets of the former Soviet Union. In the end, Russia accepted the view that if a former Soviet republic assumed a quota of the Soviet liabilities, it would be entitled to a quota of the Soviet assets).

[82] *See generally* WAR IN THE BALKANS: AN ENCYCLOPEDIC HISTORY FROM THE FALL OF THE OTTOMAN EMPIRE TO THE BREAKUP OF YUGOSLAVIA (Richard C. Hall ed., 2014) (providing a historical account of the reasons leading to the Balkan wars).

[83] *See* Williams & Harris, *supra* note 78, at 397 (explaining this settlement was reached within the Paris Club where the Western bilateral creditors sit). For additional information on the Paris Club, see CLUB DE PARIS, https://clubdeparis.org/ (last visited Mar. 8, 2024).

[84] The criterion most often proposed is the quota of the Gross National Product (GNP) of the successor states to the overall GNP of the predecessor state. Oeter, *supra* note 81, at 95.

government succession. This enlarged application of the doctrine presupposes a formalization in domestic legislations including an equitable approach.

I. The Doctrine in Evolution

Even though we accept that the odious debt doctrine can be applied in disguise in a diplomatic context relating to a state succession, the lack of formalization impedes its application beyond this context. This is the case of regime debts that were excluded from the scope of the 1983 Vienna Convention.[85] These are debts contracted by a political regime that has been replaced in the same territory by another government with a different political characterization. This exclusion has been based on the traditional assumption that the political transformation of a state does not affect debts contracted by a specific government.[86] Despite this exclusion, the odious debt doctrine has been invoked in cases of government succession to deny repayment,[87] with particular reference to debts incurred by dictators for personal and infamous purposes.[88] The emphasis on the dictatorial characterization of the borrowing government entails that the doctrine should be applicable irrespective of any change of government and to any kind of debt. This wide applicability would involve replacing the element of lack of consent by the population under a dictatorial regime with lack of consent for the absence of a parliamentary authorization to borrow.[89] This trend has stimulated the creation of contiguous categories of questionable debts, the common thread of which is the invalidity of the loan and the non-repayment of the debt.[90] These categories include illegitimate debt, criminal debt, and ineffective debt. Illegitimate debt refers to loans contracted against national law, objectively unfair, and infringing public policy.[91] Criminal debt refers to loans tainted with corruption.[92] Ineffective debt refers to loans contracted for purposes that have not been pursued.[93] This is a reasonable evolution of the concept of odious debt as the phenomenon of state succession is quite infrequent and would imply a limited operation of the doctrine.

Traditionally, the debate on the nature and extent of the odious debt doctrine has always been focused on whether debt obligations may be repudiated by successor states or governments under exceptional circumstances. By contrast, the evolutionary concept of odious debt, including its related categories, hinges on different points. First, the domain of the succession of a state or government has been abandoned, and the doctrine is also applicable in case of state or governmental continuity. Second, instead of conducting an analysis of single loans to determine their intrinsic odiousness, the analysis consists of an overall assessment of the odious nature of the

[85]Bedjaoui Report, *supra* note 9, at 56. Consistently, the Iran-U.S. Claims Tribunal has concluded that the issue of the odious debt belongs to the realm of the law of state succession. *See* United States v. Islamic Republic of Iran, 32 Iran U.S. Cl. Trib. Rep. 162, 176 (1996).

[86]*See* Sack, *supra* note 62, at 254 ("*Celles-ci sont des dettes d'Etat et non du gouvernement . . . Elles doivent être prises en charge par le nouveau gouvernement de l'Etat.")* ["These are debts of the state, not of the government . . . They must be taken on by the new government of the state."]. *See also* Georges R. Delaume, Legal Aspects of International Lending and Economic Development Financing 314–15 (1967) (explaining the fact that the rule has been evaded on occasion is not enough to question its existence).

[87]*See* Patricia Adams, Odious Debts: Loose Lending, Corruption, and the Third World Environmental Legacy 169–70 (1991).

[88]*See* Seema Jayachandran & Michael Kremer, *Odious Debt*, *in* Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis 215 (Chris Jochnick & Fraser A. Preston eds., 2006).

[89]*See* Sabine Michalowsky, Unconstitutional Regimes and the Validity of Sovereign Debt: A Legal Perspective 49–59 (2007). *See also* Feilchenfeld, *supra* note 6, at 704 (envisaging this solution).

[90]*See* Christoph G. Paulus, *The Evolution of the "Concept of Odious Debts,"* 68 Heidelberg J. Int'l L. 391, 418–28 (2008).

[91]*See* Joseph Hanlon, *Defining Illegitimate Debt: When Creditors Should be Liable for Improper Loans*, *in* Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis 109–10 (Chris Jochnick & Fraser A. Preston eds., 2006).

[92]*See* Adams, *supra* note 87, at 132–43.

[93]*See* Paulus, *supra* note 90, at 423.

borrower: In other words, odious debtors rather than odious debts. Third, particular emphasis is placed on the lender's actual or presumed knowledge—and ensuing accountability—of how the borrowed resources are used. Fourth, unlike under the traditional concept of odious debt, there is no reference to any international customary rule. Instead, the stress is placed on the moral or political unacceptability of the loan repayment.[94]

This moral or political acceptability of a debt does not exclusively reflect the interests of individual debtors. Debts may be characterized as odious insofar as that they are contrary to core values of the international community. This would be consistent with the view that the international community is a community of values[95] and its overriding universal values are worthy of protection.[96] The protection of these values would determine whether and to what extent the odious debt doctrine may be invoked and applied. A reasonable sanction for the breach of these values could be an equitable reduction of debt repayment.[97] Such a reduction would imply reconsidering the *pacta sunt servanda* rule[98] in favor of an approach more inclusive of the needs of the borrowing/developing countries.[99]

II. The Need to Formalize the Doctrine

The need to make the doctrine applicable beyond the boundaries of state or government succession and to proceed with its formalization is highlighted by the controversy on the Mozambican illegal loans.[100] In June 2019, the Constitutional Council of Mozambique declared the invalidity of a financial transaction infringing constitutional norms related to the national budget.[101] The transaction concerned a loan contracted by Ematum—a Mozambican state-owned fishing company—with Credit Suisse and guaranteed by the Mozambican government. The loan was converted into loan participation notes, which were extinguished in April 2016 under an exchange for Eurobonds issued by Mozambique.[102] In May 2020, the Mozambican Constitutional Council also declared the invalidity of two further transactions.[103] These transactions concerned

[94]*See* Vikram Nehru & Mark Thomas, *The Concept of Odious Debt: Some Considerations*, *in* Debt Relief and Beyond: Lessons Learned and Challenges Ahead 205, 210–11 (Carlos A. Primo Braga & Dörte Dömeland eds., 2009).

[95]*See* Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, *in* 281 Recueil des Cours 9, 75–76 (1998).

[96]*See* Vera Gowland-Debbas, *Judicial Insights into Fundamental Values and Interests of the International Community*, *in* The International Court of Justice: Its Future Role After Fifty Years 327, 328 (Andreas S. Muller, David Raic & J. M. Thuránsky eds., 1997). These values are protected by norms serving different purposes:

> [T]o maintain some semblance of an international public order based on the need for stability; to ensure peaceful transformation of that order based on notions of justice; to preserve a certain universal moral foundation based on a minimum core of humanitarian or ethical norms, or more basically, to ensure the physical protection or very survival of mankind. *Id.*

[97]In this sense, the odious debt doctrine can be increasingly regarded as an expression of broader general interests. *See* August Reinisch, *A History of the Doctrine of Odious Debt: Serving Individual/Bilateral or Community Interests?*, *in* From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma 1225, 1235 (Ulrich Fastenrath et al. eds., 2011).

[98]*See* Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 113 (1953).

[99]This approach would constitute a departure from the positivism that has dominated international law on a Eurocentric basis. *See* Ram P. Anand, *The Influence of History on the Literature of International Law*, *in* The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory 341, 352 (R. St John MacDonald & Douglas M. Johnston eds., 1983).

[100]*See* Matthias Goldmann, *The Law and Political Economy of Mozambique's Odious Debt*, Keynote at Centro de Integridade Pública Conference (Mar. 15, 2019), *in* How To Avoid the Repetition of Odious Debts 3 (2019).

[101]*See* Conselho Constitucional [Constitutional Council], Judgment No. 5/CC/2019 of 03-06-2019, Proceeding No. 6/-CC-/2017 (Mozam.).

[102]*See* Aled Williams, *The Mozambique Hidden Loans Case: An Opportunity For Donors to Demonstrate Anti-Corruption Commitment*, U4 Brief 2018:6 (Oct. 14, 2018).

[103]*See* Conselho Constitucional [Constitutional Council], Judgment No. 7/CC/2020 of 08-05-2020, Proceeding No. 05/-CC-/2019 (Mozam.).

loans taken by two state-owned enterprises and backed by a governmental guarantee: Loan to ProIndicus to perform coastal surveillance, contracted with Credit Suisse, and a loan to Mozambique Asset Management to build and maintain shipyards, contracted with VTB. In delivering both judgments, the Mozambican Constitutional Council highlighted that the government had acted in violation of the constitutional competence of parliament in budgetary matters, Article 179, and had not inscribed the transaction into the state budget in violation of Law No. 9/2002.[104] To complicate the picture, these transactions were arranged under a fraudulent scheme involving wide corruption and distraction of money. None of the borrowed money went to the benefit of Mozambique, which found itself burdened with a huge debt service and obliged to reduce social expenditure to repay it.[105]

The case of the Mozambican debt highlights that, over the last decade, the composition of debts incurred by developing countries has changed significantly. At the end of 2021, low and middle-income countries owed sixty-one percent of their public and publicly guaranteed debt to private creditors—an increase of fifteen percent from 2010. At the same time, IDA-eligible countries owed twenty-one percent of their external debt to private creditors, a sixteen-point increase from 2010.[106] This result in lawsuits with private creditors being brought before domestic courts. The issue is that lawsuits before domestic courts are intrinsically different from disputes arranged in a diplomatic context. A domestic court does not apply moral or political arguments; rather, it applies norms. These norms can be applied as part of either the law governing the agreement or the mandatory rules of the forum. In any case, a formalization of the doctrine is required.

III. The Formalization Process

To be applicable beyond the context of state succession, the doctrine must be formalized in all its essential elements. This is a necessary step for the doctrine to be pled in court. This crucial issue has been emphasized by the HRC Guiding Principles on Foreign Debt and Human Rights,[107] under which the criteria to establish the odiousness or illegitimacy of a particular external debt should be defined by national legislation based on the constitutive elements of the doctrine: The absence of consent by the debtor state's population, the absence of benefit to the debtor state's population, and the creditor's awareness of the above facts (Point 86).

If the three fundamental elements of the doctrine were formalized, a loan contract tainted with odiousness would be illegal under the formalizing jurisdiction. In common law, illegality can affect both the formation and the performance of the contract. In either case, the consequence would be the unenforceability of the contract.[108] The illegality of a contract does not preclude the possibility to file a claim for the restitution of the money lent. However, the remedy could be denied based on considerations of public policy. Until *Patel v. Mizra*,[109] in England the general rule was that "*ex turpi causa non oritur jus.*" Under this rule, formalized by Lord Mansfield in the famous case

[104]Judgment No. 5/CC/2019, at 17 (Mozam.); Judgment No. 7/CC/2020, at 7 (Mozam.).

[105]*See* Edson Cortez, Aslak Orre, Baltazar Fael, Borges Nhamirre, Celeste Banze, Inocencia Mapisse, Kim Harnack, & Torun Reite, Costs and Consequences of the Hidden Scandal in Mozambique 144 (2021).

[106]*See* Press Release No. 2023/035/DEC, The World Bank, *Debt-Service Payments Put Biggest Squeeze on Poor Countries Since* 2000 (Dec. 6, 2022), https://www.worldbank.org/en/news/press-release/2022/12/06/debt-service-payments-put-biggest-squeeze-on-poor-countries-since-2000. *See* Daniela Gabor, *The Wall Street Consensus*, 52 Dev. & Change 429, 429–59 (2021), (explaining that this trend is consistent with the "Wall Street Consensus," under which resources for development projects must be raised on the capital markets).

[107]*See* Human Rights Council Res. 20/23, U.N. Doc. A/HRC/20/23, at 11–17 (Apr. 10, 2011) (saying that the Guiding Principles of the Human Rights Council are centered on the primacy of human rights—particularly economic, social, and cultural rights—and on their non-retrogression in relation to state indebtedness).

[108]*See* Dan D. Prentice, *Illegality and Public Policy*, *in* Chitty on Contracts: General Principles 1223, 1228 (Hugo G. Beale ed., 31st ed. 2012).

[109]Patel v. Mirza [2016] UKSC 42 [120] (appeal taken from EWCA (Civ)) (UK). *See also* Andrew Burrows, *Illegality after Patel v. Mirza*, 70 Current Legal Probs. 55, 59 (2017).

Holman v. Johnson, "[n]o court will lend its aid to a man who founds his cause of action upon an immoral or illegal act."[110] Nevertheless, to mitigate the rigidity of this rule, the same Lord Mansfield highlighted that the denial of remedy stands to the extent that "if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it."[111] Only in this event, "*potior est conditio defendentis*."[112]

Following *Patel v. Mizra*, the courts are called to ascertain whether allowing the claim for restitution would be contrary to public interest based on public policy considerations. In this context, it is necessary to consider: First, the underlying purpose of the provision that has been infringed and whether this purpose can be reinforced by the denial of the claim; second, other public policies on which the denial of the claim may have an effect; and, third, whether the denial of the claim would be a proportionate sanction, considering that punishment is a matter for the criminal court.[113] The watershed is whether allowing the claim would stultify the purpose of the rule making the contract illegal. This criterion would not only cover the parties of the illegal transaction, but also other parties in similar transactions.[114]

The position of English courts is consistent with the U.S. Restatement (Third) of Restitution and Unjust Enrichment, reformulating the rules of the Restatement (Second) of Contracts, pursuant to which there is no claim when the allowance of restitution would defeat the policy of the law that makes the agreement unenforceable.[115] In this context, two competing policies come into play: The policy against unjust enrichment and the policy prohibiting the underlying transaction. If these policies are incompatible, the public policy against the enforcement of the transaction prevails over the private claims based on unjust enrichment.

In light of the above, it can be inferred that a claim for a restitutionary remedy in case of an illegal loan could be reasonably denied, when granting the remedy would imply stultifying the law, as the underlying public policy would consist of ensuring fairness in financial transactions with sovereign borrowers. This denial would result in neutralizing the acceleration clauses contained in the terms of the loan.[116] This neutralization would involve that resources already earmarked for the repayment of the debt can be applied to social expenditure. Nevertheless, it would also imply that lenders incur in specular losses. This scenario would deter many countries, namely the United States and Great Britain, from formalizing and acknowledging the doctrine in their jurisdictions. A possible solution could be to formalize the doctrine complemented by an equitable standard based on an objective parameter capable to strike a balance between the interests of all the affected parties.

IV. In Search of an Equitable Standard

The U.K. Debt Relief Act of 2010 may constitute a useful benchmark in providing an equitable standard for the restitution of an odious debt.[117] The Act was adopted in the wake of the controversies following the judgment rendered in *Donegal v. Zambia*, where the London High Court ruled in favor of Donegal International and ordered Zambia to pay $15.4 million.[118] That

[110]Holman v. Johnson (1775) 98 Eng. Rep. 1120; 1 Cowp. 341 (Lord Mansfield) (Gr. Brit.).

[111]*Holman* (1775) 98 Eng. Rep. at 1121 (Lord Mansfield).

[112]*Holman* (1775) 98 Eng. Rep. at 1121 (Lord Mansfield), ["In equal fault—better is the condition of the possessor."].

[113]*Patel* [2016] UKSC 42 at [120].

[114]*See* GOFF & JONES: THE LAW OF UNJUST ENRICHMENT 897–900 (Charles Mitchell, Paul Mitchell & Stephen Watterson eds., 9th ed. 2016).

[115]RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 31 (2011).

[116]*See* PHILIP R. WOOD, INTERNATIONAL LOANS, BONDS, GUARANTEES, AND LEGAL OPINIONS 125, 242, 294 (2d ed., 2007) (stating that under syndicated loans, the acceleration is declared by the agent bank following a vote by the majority of the banks, whereas under bonded loans, the acceleration is declared by the trustee; in the absence of a trustee, each bondholder may declare acceleration on his bonds).

[117]*See* The Debt Relief (Developing Countries) Act 2010 (Permanent Effect) Order 2011, SI 2011/1336 (UK).

[118]Donegal International v. Zambia [2007] EWHC (Comm) 197, 1 Lloyd's Rep. 397 (UK).

amount was equivalent to sixty-five percent of the country's savings in debt relief under the Highly Indebted Poor Countries (HIPC) Initiative.[119] Under the Debt Relief Act,[120] a UK court cannot render a judgment, or enforce a foreign judgment or an arbitral award, against an HIPC under which private creditors would be enabled to recover their credits in excess of the sustainable level as calculated under the HIPC Initiative, Section 3.[121] The Act applies to debts incurred prior to its enactment and prior to the decision point under the HIPC Initiative; these debts must be public, including municipalities' debts, or backed by public guarantee and held by persons non-resident in the debtor country. Debts related to the payment of goods and services are excluded as are debts with maturities shorter than one year.[122] The whole Act implies that it is against public policy to enforce a claim or a judgment that runs counter to a HIPC's debt sustainability.[123] Although the UK Act does not involve any cancellation of debt, enforcement is limited to the recoverable amount irrespective of the proper law of the debt or claim. This limit in recovering applies to bilateral, multilateral, and commercial creditors alike.[124] Its extent depends on whether the debtor country participates in the HIPC Initiative or is merely eligible to join it.[125] The UK Act has introduced a ceiling in delivering a judgment or enforcing a foreign judgment or arbitral award relating to a debt owed by a country participating in the HIPC Initiative. The whole picture deserves some remarks. First, this treatment is reserved to countries participating in, or eligible for, the HIPC Initiative. Second, the ceiling consists of the sustainable level as calculated under the HIPC Initiative. Third, this ceiling has been acknowledged in a piece of domestic legislation under which is against public policy to enforce a claim or a judgment that runs counter to debt sustainability.[126]

[119]Hum. Rts. Council, Rep. of the Indep. Expert on the Effects of Foreign Debt & Other Related Int'l Fin. Obligations of States on the Full Enjoyment of all Hum. Rts., Particularly Econ., Soc., & Cultural Rts., para. 25, U.N. Doc. A/HRC/14/21 (2010).

[120]*See* Patrick Wautelet, *Vulture Funds, Creditors, and Sovereign Debtors: How to Find a Balance?*, Insolvabilité des États et dettes souveraines 99, 124 (Mathias Audit ed., 2011) (explaining that the Act originally intended to remain in force for one year but was adopted after a public consultation strongly backed by the Jubilee Campaign, and that the UK initiative induced two holdouts on Liberia debt to accept the terms on offer from the IDA managed Debt Reduction Facility). *Cf.* IMF & World Bank, Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI)—Status of Implementation and Proposals for the Future of the HIPC Initiative (2011).

[121]*See* IMF, *Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative* (2023), www.imf.org/external/np/exr/facts/hipc.htm (explaining how debt relief to poor countries is given under the HIPC Initiative and the Multilateral Debt Relief Initiative (MDRI). The HIPC Initiative was launched in 1996 by the World Bank and the IMF, with the aim of providing a debt reduction program in favor of the eligible IDA-only countries. In 1999, it was improved under the HIPC Enhanced Initiative, designed to lower the level of the economic targets to achieve and to connect debt reduction to poverty relief more effectively). *See also* IMF, *Multilateral Debt Relief Initiative: Questions and Answers* (2017), www.imf.org/external/np/exr/facts/mdri.htm. (explaining how the MDRI involves the cancellation of 100 percent of the claims held by three multilateral institutions—the IMF, the International Development Association, and the African Development Fund—against debts owed by countries that have granted relief under the HIPC Initiative). *See generally*, Leonie F. Guder, The Administration of Debt Relief under the International Financial Institutions: A Legal Reconstruction of the HIPC Initiative (2009).

[122]*See* Michael Waibel, *Debt Relief to Poor Countries: Rules v. Discretion*, 25 Butterworths J. Int'l Banking & Fin. L. 295 (2010).

[123]*See* Mauro Megliani, *For the Orphan, the Widow, the Poor: How to Curb Enforcing by Vulture Funds Against the Highly Indebted Poor Countries*, 31 Leiden J. Int'l L. 363, 371–72 (2018).

[124]*See* Justin Vanderschuren, Les actions judiciaires des spéculateurs sur les dettes souveraines: Réglementer les activités des fonds dits vautourds un souci de soutenabilité 435–37 (2022) (stating that this ensures parity of treatment among all the creditors).

[125]Debt Relief (Developing Countries) Act 2010 2009-10, HC Bill [22] cl. 4 (UK):

> Where the qualifying debt is one to which the Initiative applies, the relevant proportion is—$\frac{A}{B}$—where A is the amount the debt would be if it were reduced in accordance with the Initiative—on the assumption, if it is not the case, that completion point has been reached for the purposes of the Initiative in respect of the country whose debt it is—and B is the amount of the debt without it having been so reduced. Where the qualifying debt is a debt of a potentially eligible Initiative country, the relevant proportion is 33 per cent.

[126]*See* Megliani, *supra* note 123, at 371–72.

On the trail of the UK Debt Relief Act, an equitable criterion, either in ruling on the claim for restitution or in enforcing a foreign judgment or arbitral award relating to an odious debt, could be constituted by the benefit for the population.[127] In certain situations, borrowed resources are presumably spent without benefit for the population. These situations include money being used for personal enrichment, arms or military expenses being used in a manner contrary to the interests of the population, infrastructures being distributed in a discriminatory manner, and funds being used to promote oppressive institutions.[128]

However, when resources enter the general budget of the borrowing state, it is difficult to understand whether and to what extent they are spent for the benefit of the population. In this case, the *discrimen* is given by the oppressive, neutral, or beneficial characterization of expenditure. Expenditure for oppressive institutions, for example., state security agencies, state-run media, prisons for political prisoners, police hardware, political campaigns, and more, may be deemed not completely for the benefit of the population. Expenditure for neutral institutions, for example, governmental offices and equipment, public enterprises, depends on the qualification of the government. In the case of dictatorial or quasi-dictatorial regimes, the current market value of the expenditure is deducted from its purchase price, and the difference is deemed to be the absence of benefit. In the case of a democratic or quasi-democratic government, expenditures are presumed to be for the benefit of the population. Expenditure for services that are for the benefit of the population and generally available, for example, healthcare, educational facilities, roads, and more, are assumed to be beneficial.[129] However, these categories should be intended more as flexible standards than as rigid rules. The key point is that a debtor state should be liable only for the benefit received by the population. Unbeneficial proceeds should not be repaid.[130] These criteria may be used as guidelines to quantify the benefit for the population in case of an odious debt.

V. Formalizing the Equitable Rule

Once the odious debt doctrine is statutorily formalized, a loan agreement infringing the statute is illegal and cannot be enforced.[131] In this context, allowing a claim for restitution would risk stultifying the rule making the contract illegal. Nevertheless, a denial of restitution would involve a loss for the lenders. Such a scenario would introduce uncertainty in the financial relationships. This results in many countries being refrained from formalizing and acknowledging the doctrine in their jurisdictions. This is particularly the case of the United States and Great Britain, the laws and courts of which are usually indicated, respectively, in the law selection clause and in the forum selection clause of the terms of the loans.[132] These laws and courts have traditionally proved to be sensitive to the reasons of creditors. To appease the recalcitrance of these countries, the formalization of the doctrine should include an equitable rule based on the objective criterion of the benefit for the population. Regarding this, Sack highlighted that a loan may be "*tout ou partie*"

[127] *See* SACK, *supra* note 1, at 163 (showing that only an independent international tribunal could establish whether and to what extent a loan might be odious).

[128] *See* Ashfaq Khalfan, Jeff King & Bryan Thomas, *Advancing the Odious Debt Doctrine* 45 (Ctr. for Int'l Sustainable Dev. L., Working Paper, 2003).

[129] *See* Khalfan, King & Thomas, *supra* note 128, at 46. *See also* MICHALOWSKI, *supra* note 89, at 56–58 (explaining that in the case of a democratic government, the benefit must be assessed prospectively and not retrospectively, otherwise successor governments could be allowed to terminate obligations assumed by antecessor governments based on a political re-appraisal of the expenses).

[130] *See* Khalfan, King & Thomas, *supra* note 128, at 46.

[131] *See* RICHARD A. BUCKLEY, ILLEGALITY AND PUBLIC POLICY 14 (2d ed. 2009) (saying that in this case, there is an express prohibition of the activity referred to in the statute. Nevertheless, the prohibition may also be formalized as an implied prohibition where the contravention of the statute does not involve the unenforceability of the contract).

[132] *See* HAYK KUPELYANTS, SOVEREIGN DEFAULTS BEFORE DOMESTIC COURTS 61, 111 (2018).

("all or part") odious, with the result that the portion employed to benefit the population must be repaid.[133]

The inclusion of the equitable rule in the formalization process is far from being a forced step. In the context of state and government succession, the doctrine has often been applied on equitable basis and several criteria have been considered to settle disputes on assets and liabilities. This was because, at the diplomatic level, the settlement of dispute was more a method than a rule. A similar approach is not replicable at the judicial level where courts and tribunals are called to apply an objective criterion, as in the case of the UK Debt Relief Act. Consequently, the formalization process of the doctrine must include a specific criterion—the benefit for the population—to quantify the restitution. In this way, the benefit for the population would play a double-faced role: A constitutive element of the doctrine and a measure for the repayment.

D. Methods of Formalizing the Doctrine

Currently, binding norms on odious debt are lacking in domestic legal systems. This lacuna has been highlighted in the HRC Guiding Principles on Foreign Debt and Human Rights, according to which the criteria to establish the odiousness or illegitimacy of a particular external debt should be defined by national legislation.[134] The Guiding Principles do not contain any reference to how national legislations could establish these criteria. It can be reasonably assumed that some international instrument can constitute either a benchmark or a stimulus to legislate. These instruments can take many forms: An international convention, a model law, a soft law instrument, a set of contractual clauses, or a declaration of principles. Except for an international convention, all these instruments are not per se binding but may induce national legislators to fill the lacuna highlighted by the Guiding Principles by introducing in their legal systems the notion of odious debt and the consequences for loan agreements tainted with odiousness, including the invalidity of the loan and the equitable rule for repayment.

I. Conventions

Domestic legal systems do not present sufficient underpinnings to support the legal existence of the odious debt doctrine, not even in a disguised form.[135] To fill this lacuna and ensure uniformity, the adoption of an international convention could be an adequate step. In this context, a 2015 proposal for a convention on odious debt was based on the nature of the contracting state and the use of the proceeds of the loan agreements. Under this proposal, all agreements concluded after the entry into force of the convention would be void if the contracting party were a state classified as prone to odious debts, unless the agreements complied with the principles of responsible contracting as set out in the convention. Parties to the proposed convention would commit themselves to refrain from concluding or issuing guarantees for odious agreements and to cooperate internationally to refrain from their conclusion.[136] The proposal was designed to prevent odious loans while permitting legitimate lending.[137] Under this proposal, odious debt agreements would be void and could not be enforced. In the same vein, judgments, awards, or other enforcement orders relating to these agreements could not be enforced in the courts of state parties. However, this sanction may appear too rigid and punitive for the creditors because the states of the traditionally seized fora—New York and London—could become parties to the

[133] *See* SACK, *supra* note 1, at 30.

[134] *See* H.R.C. Res. 20/23, *supra* note 107.

[135] *See* Mitu Gulati, Lee C. Buccheit & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L. J. 1201, 1262 (2007).

[136] *See* Friedrich B. Schneider, *The International Convention on the Prevention of Odious Agreements: A Human Rights-Based Mechanism to Avoid Odious Debts*, 28 LEIDEN J. INT'L L. 557, 578 (2015).

[137] *See* SEEMA JAYACHANDRAN, MICHAEL KREMER & JONATHAN SHAFTER, APPLYING THE ODIOUS DEBTS DOCTRINE WHILE PRESERVING LEGITIMATE LENDING 5, 26 (2006).

proposed convention. In this context, rigidity comes into play in two regards: First, states would be obliged to decline enforcement of odious debt agreements and of foreign judgments and awards relating to these agreements; and second, states would be deprived of the possibility of striking a balance between the interests of the borrower and those of the lenders. This rigidity could be mitigated in two ways: First, by leaving the decision to enforce or not to enforce agreements and judgments to signatory parties; and second, by introducing an enforcement ceiling capable of balancing the interests of all the affected parties.

To gain a wide acceptance, such a convention should be adopted by the U.N. General Assembly and then opened to signature. However, due to the sensitiveness of the subject, it is unlikely that such a convention could be drafted and adopted by the General Assembly, and even less signed and ratified by member states.[138]

II. Model Laws

The main advantage of a convention is that it is binding upon contracting states. Bindingness involves certainty but may also introduce rigidity in matters traditionally characterized by a high degree of flexibility, such as sovereign indebtedness. Flexibility is better served by model laws. Model laws aim to facilitate, as appropriate, the review and amendment of existing legislation, as well as the adoption of new legislation at the national level. Such national legislations can be amended by a country without infringing international law.[139]

Model laws focus on substantive obligations rather than on form, which ought to be tailor-made to the needs of each country. In this context, the model law provisions are meant to help with, but not to substitute the national process of drafting a law. On the one hand, the less formal process of drafting and enacting a model law can promote open communication between all the interested subjects. On the other hand, a model law approach can sometimes be more effective than a formal treaty approach.[140]

The most active institution in drafting models laws is UNCITRAL, that is committed to formulating modern, fair, and harmonized rules on commercial transactions.[141] The most significant instance of a model law coincides with the UNCITRAL Model Law on International Commercial Arbitration, which has gained wide acceptance because of its non-binding nature.[142] The UNCITRAL Model Law provides a pattern that national lawmakers can adopt as part of their domestic legislation on arbitration.[143] In a similar vein, the adoption of a model law on sovereign debt, including the odious characterization of a debt and its consequences, may operate as a

[138] *See* Sean Hagan, *Designing a Legal Framework to Restructure Sovereign Debt*, 36 GEO. J. INT'L L. 299, 305 (2005) (saying that recalcitrance towards binding norms is well reflected by the failure of the proposal establishing a sovereign debt bankruptcy regime).

[139] *See* Steven L. Schwarcz, *Sovereign Debt Restructuring: A Model-Law Approach*, 6 J. GLOBALIZATION & DEV. 343, 348 (2016).

[140] *Id.* at 349.

[141] *See* G.A. Res. 21/2205 (XXI), at 99 (Dec. 17, 1966) (establishing United Nations Trade Commission on Trade Law—UNCITRAL— "to promote the progressive harmonization and unification of international trade law" through conventions, model laws, and other instruments that address key areas of commerce, from dispute resolution to the procurement and sale of goods).

[142] *See* U.N. Comm'n on Int'l Trade Law, Overview of the Status of UNCITRAL Conventions and Model Laws (Feb. 29, 2024), overview-status-table.pdf (un.org).

[143] *See* generally ILIAS BANTEKAS, PIETRO ORTOLANI, SHAHLA ALI, MANUEL A. GOMEZ, & MICHAEL POLKINGHORNE, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: A COMMENTARY (2020) (explaining that the UNCITRAL Model Law is designed to assist states in reforming and modernizing their laws on arbitral procedure to consider the features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. Also, it reflects worldwide consensus on key aspects of international arbitration practice having been accepted by states of all regions and the different legal or economic systems of the world).

benchmark and stimulus for national legislators to regulate the matter, allowing them a certain room for maneuver.

III. Soft Law Instruments

A more flexible approach would consist of soft instruments. International financial law is characterized more by soft law than hard law for several reasons. First, because it lacks a formal institutional structure, such as trade law. Second, because it is not rooted in international agreements as they involve complex negotiations and long ratification processes. Third, because it needs to adapt swiftly to the ever-changing scenario of financial markets.[144] Against this background, two pieces of soft law might be amended to include the essential elements of the odious debt doctrine: The UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing and the UNIDROIT Principles of International Commercial Contracts.

The UNCTAD Principles[145] do not intend to create new rights or obligations, but rather to identify and systematize basic principles and best practices in the field of sovereign financing.[146] Although the acknowledgment of the Principles in restructuring and litigation remains uncertain,[147] they may serve as a benchmark for sovereign borrowers and their lenders. From a formal point of view, these Principles are a soft law instrument that may influence the interpretation, application, and development of other rules.[148] From a substantive point of view, they have been derived by analogy from domestic legal systems and present a non-uniform legal status.[149] The odious debt doctrine is not explicitly mentioned in the Principles, but some of its elements emerge from Principles No. 1 and No. 3 according to which a government might be indicated as odious when its officials fail to protect the interests of the population.[150] In this context, it is reasonable to suggest that an updated version of the Principles should contain a clear acknowledgment of the odious debt doctrine including the consequential invalidity of the loan agreement and the equitable repayment rule.

The UNIDROIT Principles are a restatement of international legal principles applicable to international commercial contracts drafted by a distinguished group of international experts from the major legal systems, without the intervention of states or governments.[151] The Principles apply when the parties have agreed that their contract be governed by them or be

[144] *See* Chris Brummer, *Why Soft Law Dominates International Finance—And Not Trade*, 13 J. Int'l Econ. L. 623, 624–43 (2010).

[145] U.N. Conference on Trade and Development, *Principles on Promoting Responsible Sovereign Lending and Borrowing* (Jan. 10, 2012) (saying that the principles constitute the outcome of the UNCTAD Project on Promoting Responsible Sovereign Lending and Borrowing).

[146] *See* Juan Pablo Bohoslavsky & Carlos Espósito, *Principles Matter: The Legal Status of the Principles on Responsible Sovereign Refinancing, in* Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing 73, 77 (Carlos Espósito, Yuefen Li & Pablo Bohoslavsky eds., 2013) (mentioning that in this sense, they constitute a gap filling in this field) [hereinafter Sovereign Financing and International Law].

[147] *See* Juan Pablo Bohoslavsky & Matthias Goldmann, *An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law*, 41 Yale J. Int'l L. Online 13, 38–42 (2016).

[148] *See* Bohoslavsky & Espósito, *supra* note 146, at 80–81, 86 (saying that they have a dynamic status).

[149] *See* Matthias Goldmann, *On the Comparative Foundations of Principles in International Law, in* Sovereign Financing and International Law, 131, 132–33 (Carlos Espósito et al. eds., 2013) (saying that the principles may be classified as general principles of law—agency, authorization, bindingness; emerging principles—assessment of a borrower's capacity, lender's due diligence; guiding principles—audits, disclosure of information; or structural principles—avoiding overborrowing).

[150] *See* Robert Howse, *Concluding Remarks in the Light of International Law, in* Sovereign Financing and International Law, 385, 388 (Carlos Espósito et al. eds., 2013).

[151] *See* UNIDROIT, Unidroit Principles of International Commercial Contracts (2016) [hereinafter UNIDROIT Principles]. *See also* Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts: Why? What? How?*, 69 Tul. L. Rev. 1121 (1995); and Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC) (Stefan Vogenauer ed., 2d ed. 2015).

governed by general principles of law or *lex mercatoria*. They may also apply when the contract is silent on the applicable law. Further, they may be used as a means of interpreting and supplementing international uniform law instruments and domestic law.[152] Finally, they may serve as a model for national and international legislators. Although the Principles do not contain a specific reference to odious debt, some elements of the doctrine can be found under its umbrella.[153] Article 3.2.7 stipulates that a party is entitled to avoid a contract in cases where there is gross disparity between the obligations of the parties, which gives one party an unjustifiably excessive advantage.[154] The excessive advantage must exist at the time of the conclusion of the contract. Not only must the advantage be excessive; it must also be unjustifiable. Unjustifiability depends on the unequal bargaining position of the parties and the nature and purpose of the contract. In this case, at the request of the party who is entitled to avoidance, the seized court may adapt the contract to bring it into accord with reasonable commercial standards of fair dealing. On the same footing, the party receiving notice of avoidance may request such adaptation provided it informs the avoiding party of its request.[155] Either party may claim restitution for what is provided under the avoided contract. In case of avoidance for infringing a mandatory rule, Article 3.3.2. establishes that restitution may be granted when it would be reasonable.[156] Under the Principles, mandatory rules must be understood in a broad sense to cover both specific statutory provisions and general principles of public policy.[157] Also in this case, the Principles could be updated, at least in the explanatory comments, to include a definition of odious debt comprehensive of its consequences among the broad notions of mandatory rules.

IV. Contractual Clauses

A significant contribution toward the formalization of the odious debt doctrine may come from the Collective Action Clauses (CACs). CACs were introduced in 2002 as a response to problems arising under the Argentine debt restructuring.[158] The G-10 established a Working Group on Contractual Clauses to draft a model of contractual clauses to be inserted into the terms of bonded

[152]To promote the widest application of the Principles, the UNIDROIT has drafted Model Law Clauses:

> (i) to choose the Principles as the rules of law governing the contract; (ii) to incorporate the Principles as terms of the contract; (iii) to refer to the Principles to interpret and supplement the Convention on International Sale of Goods when the latter is chosen by the parties; or (iv) to refer to the Principles to interpret and supplement the applicable domestic law, including any international uniform law instrument incorporated into that law.

UNIDROIT, UPICC MODEL CLAUSES: MODEL CLAUSES FOR THE USE OF THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2013) [hereinafter MODEL CLAUSES].

[153]Sovereign loans fall squarely under the definition of international commercial contracts as acknowledged in the UNIDROIT Principles. This is because under the Principles, the concept of "international" contracts should be given the broadest possible interpretation, so as ultimately to exclude only those situations where no international element at all is involved. UNIDROIT PRINCIPLES, *supra* note 151, at 1–2. *See* MAURO MEGLIANI, SOVEREIGN DEBT: GENESIS, RESTRUCTURING, LITIGATION 65–67 (2015) (stating that in this context, it is worth recalling that sovereign loans have for a long time lost their sovereign characterization).

[154]*See* UNIDROIT PRINCIPLES, art. 3.2.7 (describing "Gross disparity")

[155]*See* UNIDROIT PRINCIPLES, art. 3.2.7, cmt. 3 (explaining avoidance or adaptation under Article 3.2.7).

[156]*See id.* art. 3.3.1, § 3(a)–(g) describes reasonableness as depending on:

> (a) the purpose of the rule which has been infringed; (b) the category of persons for whose protection the rule exists; (c) any sanction that may be imposed under the rule infringed; (d) the seriousness of the infringement; (e) whether one or both parties knew or ought to have known of the infringement; (f) whether the performance of the contract necessitates the infringement; and (g) the parties' reasonable expectations.

[157]*See id.* art. 1.4, cmt. 2.

[158]*See* Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default,* 6 CHI. J. INT'L L. 311 (2005); and Mark Gugiatti & Anthony Richards, *The Use of Collective Action Clauses in New York Law Bonds of Sovereign Borrowers*, 35 GEO. J. INT'L L. 815 (2004) (explaining that in 2001, Argentina defaulted on its huge external debt and the restructuring process was characterized by a take-it or leave-it approach by Argentina, in part as unanimity was required to amend the payment terms in the bonded loans under New York law).

loans.[159] The broad term "CACs" embraces not only majority action clauses, but also collective representation clauses, majority enforcement clauses, and engagement clauses.[160] Concretely, the first step to include CACs in all sovereign bonds issuances was undertaken by Mexico, which in February 2003 launched a bonded loan containing CACs, under which it was possible to amend payment terms by a majority of seventy-five percent of the outstanding bonds.[161] The market responded positively and in April 2003 Mexico launched two other bonded loans including CACs. Majority action clauses make it possible to amend payment terms through a qualified majority of the outstanding bonds.[162] Further, aggregation clauses permit the coordination of all the series of bonds affected by a restructuring process.[163] In 2014, the International Capital Markets Association drafted the Standard Aggregated CACs for the Terms and Conditions of Sovereign Notes, which provide for aggregated voting procedures for multiple series of bonds. In case of "Two-Limb Voting," reserved matters can be modified by a majority of at least two-thirds of the aggregate principal amount of the outstanding bonds of all the affected series and of more than fifty percent of the aggregate principal amount of the outstanding bonds of each single series. In case of "Single-Limb Voting," reserved matters can be modified by a majority of at least seventy-five percent of the aggregate principal amount of the outstanding bonds of all the affected series. This single-limb mechanism was conceived to overcome the phenomenon of blocking minorities on small issues.[164]

In this context, a further development of CACs might include a clause encapsulating the fundamental elements of an odious debt, complemented by the invalidity of the agreement and the equitable rule for repayment. Although these updated CACs would not be binding per se, their endorsement by the G20 may induce market operators to insert them into the terms of the loans with sovereign borrowers.

V. Declaration of Principles

The odious debt doctrine may also become the object of a declaration of principles by the U.N. General Assembly. No constitution of an international organization contains a reference to declarations as a specific category of act.[165] A proposal to enable the United Nations to adopt binding declarations of principles was advanced at the Conference of San Francisco, 1945, but failed to gain the necessary consent.[166] In spite of that failure, under the U.N. practice, declarations

[159] *See* The Group of Ten [G10], *Report of the G-10 Working Group on Contractual Clauses*, (Sept. 26, 2002) https://www.bis.org/publ/gten08.pdf (The work of this Group was focused on three main objectives: [T]o improve the communication among creditors and sovereign debtors, to ensure that the restructuring process is not obstructed by a minority of bondholders, and to avoid individual legal action from obstructing the restructuring process).

[160] *See* Robert B. Ahdieh, *Between Mandate and Market: Contract Transition in the Shadow of the International Order*, 53 EMORY L.J. 691, 698 n.15 (2004).

[161] *See* Anna Gelpern & Mitu Gulati, *Innovation After the Revolution: Foreign Sovereign Bond Contracts Since 2003*, 4 CAP. MKTS L.J. 85, 88–89 (2009).

[162] *See* Sergio J. Galvis & Angel L. Saad, *Collective Action Clauses: Recent Progress and Challenges Ahead*, 35 GEO. J. INT'L L. 713 (2004).

[163] *See* Charles D. Schmerler, *Restructuring Sovereign Debt*, *in* THE LAW OF INTERNATIONAL INSOLVENCIES AND RESTRUCTURINGS 431, 463–64 (James R. Silkenat & Charles D. Schmerler eds., 2006) (showing that Uruguay was the first country to insert a similar clause in the restructuring of its debt in 2003).

[164] *See* Int'l Cap. Market Ass'n (ICMA), Standard Aggregated Collective Action Clauses ("CACS") for the Terms and Conditions of Sovereign Notes Governed by English Law, ICMA-Standard-CACs-Pari-Passu-and-Creditor-Engagement-Provisions—May-2015.pdf (icmagroup.org) (last visited Apr. 2, 2024). *See also* Anna Gelpern, Ben Heller & Ben Setser, *Count the Limbs: Designing Robust Aggregation Clauses in Sovereign Bonds*, *in* TOO LITTLE, TOO LATE: THE QUEST TO RESOLVE SOVEREIGN DEBT CRISES 109 (Martin Guzman, José Antonio Ocampo & Joseph E. Stiglitz eds., 2016).

[165] *See* HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY 784 (5th rev. ed. 2011).

[166] *See* Yuen-Li Liang, *The General Assembly and the Progressive Development and Codification of International Law*, 42 AM. J. INT'L L. 66 (1948).

of principles are resorted to in relation to matters of major importance and are expected to be widely implemented. Formally, declarations are no different in effect from recommendations. They do not bind but invite member states to adopt a certain behavior in relation to specific matters. Nevertheless, declarations may be binding to the extent that they encapsulate international norms. This may occur in four situations: Declarations containing a codification of customary law, declarations containing general principles of law, declarations containing specification of obligations already encapsulated in the U.N. Charter, and declarations containing legally binding provisions in the absence of a contrary norm.[167]

A declaration of principles on the odious debt doctrine would not fall under either of the above-mentioned categories. However, the value of a declaration should not be underestimated. At the beginning of the life of the United Nations, representatives of member states recognized that General Assembly resolutions would bear "moral force," "moral weight," "moral authority," "moral power," or "moral obligation."[168] This moral qualification should not be reasonably extended to the uncountable number of the General Assembly resolutions but should be reserved for declarations or declaratory recommendations.

Against this background, the approval of a declaration incorporating the elements of the odious debt doctrine by unanimity or quasi-unanimity of the U.N. member states may reflect the view that its content will correspond to a fundamental value of the international community. Such a declaration of principles should complement the declaratory resolution on the Basic Principles on Sovereign Debt Restructuring Processes.[169] The Basic Principles are designed to ensure that creditors and debtors act in good faith and with a cooperative spirit to reach a consensual arrangement in debt restructuring processes. Along the same lines, a declaration on the odious debt, or more broadly on the Basic Principles of Sovereign Debt, should be designed to ensure that lenders and borrowers act in good faith in the making of loan agreements.[170] Such a declaration may influence national legislation and could be reinforced by a procedure to review its implementation.[171]

VI. Transnational Public Policy

All the instruments described above, including a convention not entered into force, lack binding effects. This implies that national legislators can ignore the call for a formalization of the doctrine and avoid acknowledging it in their legal systems. The consequence of this failed acknowledgment is that domestic courts and arbitral tribunals are unable to declare the invalidity of a loan agreement affected by odiousness and apply the equitable rule. Nevertheless, judges and arbitrators can rely on these instruments not so much as encapsulating positive obligations, but rather as reflecting public policy. This is because these instruments may represent the general view that values protected under the odious debt doctrine correspond to fundamental values of the international community, and thus loan agreements tainted with odiousness would be invalid and limited in recovery.[172]

[167] *See* SCHERMERS & BLOKKER, *supra* note 165, at 785–89 (stating that in all these cases, unanimity or quasi unanimity is required to achieve a legal effect).

[168] *See* F. Blaine Sloan, *The Binding Force of a "Recommendation" of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT'L L. 1, 31–32 (1948). *See also* C. EAGLETON, INTERNATIONAL GOVERNMENT 321, 665 (1957) (stating that this is because the General Assembly is the supreme world forum).

[169] *See* G.A. Res. 69/319, Basic Principles on Sovereign Debt Restructuring Processes (Sept. 10, 2015) (showing that in September 2015 the U.N. General Assembly adopted a declaratory resolution on sovereign debt aimed at curbing the judicial activism of vulture funds). *See also* G.A. Res. 69/319, para. 2 (saying that under this resolution, all Member and observer States, competent international organizations, entities, and other relevant stakeholders are invited to support and promote the Basic Principles); Martin Guzman & Joseph E. Stiglitz, *A Soft Law Mechanism for Sovereign Debt Restructuring Based on the U.N. Principles*, *in* SOVEREIGN DEBT AND HUMAN RIGHTS 446 (Ilias Bantekas & Cephas Lumina eds., 2018).

[170] *See* Mauro Megliani, *The Odious Debt Doctrine: Formalizing Values*, 53 L'OBSERVATEUR DES NATIONS UNIES 107, 117 (2022).

[171] *See* SCHERMERS & BLOKKER, *supra* note 165, at 791.

[172] *See supra* Section C.III.

Legal scholarship has progressively identified three types of public policy: Municipal, international, and transnational. Municipal public policy has the effect of rendering a contract void and unenforceable.[173] International public policy consists of values that are regarded as so fundamental by the seized forum that their infringement can block the application of a foreign law or the enforcement of a foreign act.[174] Transnational public policy, or the truly international public order, "is the one that establishes universal principles, in various fields of international law and relations, to serve the higher interests of the world community, the common interests of mankind, above and sometimes even contrary to the interests of the individual nations."[175] Its values may come from many sources: Natural law, principles of universal justice, *jus cogens*, and general principles of morality and public policy accepted in civilized countries.[176] Further to the prohibition of corruption, which can be regarded as a sort of cornerstone of transnational public policy,[177] these values include the abhorrence of slavery, discrimination, kidnapping, murder, piracy, and terrorism, and the promotion of fundamental human rights.[178]

Arbitral practice has significantly contributed to the emergence of transnational public policy in relation to international contracts.[179] The ICC Award No. 1110, 1963, represents a milestone in this regard. The claim was based on failure to pay services under a bribery contract between an Argentine intermediary and a German firm.[180] Judge Lagergren, the sole arbitrator, declined to hear the case on the assumption that "corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations."[181] In the view of Judge Lagergren, cases involving gross violation of good morals and international public law could not have countenance in any court of a civilized country or arbitral tribunal.[182] The issue of a truly international public order again came into play in the 2006 case *World Duty Free Company Ltd v. Kenya*.[183] The claim concerned an act of expropriation of duty-free complexes at Nairobi and Mombasa airports by the Kenyan government. During the proceedings, evidence emerged that the agreement for the construction and maintenance of the duty-free complexes had been tainted with corruption.[184] Because the ICSID tribunal found that corruption was contrary to the international public policy of most countries, or transnational public policy, the claim was dismissed. In the view of the ICSID tribunal, transnational public policy consisted of "an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora."[185]

In terms of odious debt, public policy may operate at a double level: First, sanctioning the invalidity of a loan agreement and, second, limiting the recovering of a debt. The first level of public policy would be coherent with the normal effect of public policy on contracts. International contracts—including loan contracts with a sovereign borrower—that infringe transnational public

[173] *See* KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 380–81 (T. Weir trans., 3rd ed. 1998).

[174] *See* Mathias Forteau, *L'ordre public transnational ou réellement international,* 138 J. DU DROIT INT'L 3, 5 (2011).

[175] *See* Jacob Dolinger, *World Public Policy: Real International Public Policy in the Conflict of Laws*, 17 TEXAS INT'L L.J. 167, 172 (1982).

[176] *See* JULIAN D.M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY IN COMMERCIAL ARBITRATION AWARDS 534, 633 (1978).

[177] *See* JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC 393–94 (1999).

[178] *See* LEW, *supra* note 175, at 535.

[179] *See* Stephen R. Jagusch, *Issues of Substantive Transnational Public Policy*, *in* INTERNATIONAL ARBITRATION AND PUBLIC POLICY 23, 29 (Devin Bray & Heather L. Bray eds., 2014).

[180] Argentine Engineer v. British Company, ICC Case No. 1110, Award (1963), 10 ARB. INT'L 282 (1994).

[181] *See id.* at para. 20.

[182] *See id.* at para. 23.

[183] *See* World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, para. 62 (Oct. 4, 2006).

[184] *See* Cecily Rose, *Questioning the Role of International Arbitration in the Fight Against Corruption*, 31 J. INT'L ARB. 183, 202–04 (2014).

[185] *See World Duty Free*, ICSID Case No. ARB/00/7, at para. 139.

policy are invalid and cannot be enforced.[186] The second level of public policy would be coherent with the interests of the international community to see repayment reduced to the benefit for the population.[187]

E. Conclusion

In the 1920s, the Russian émigré Alexander Sack envisaged the existence of the odious debt doctrine from some exceptions to the passing rule in case of state and government succession. This doctrine was based on three elements: The making of a loan by a dictatorial government, the absence of benefit for the population, and the awareness of the creditors. This picture justified the failed passing of a debt to a successor state or government. However, at a deeper analysis, the practice of state and government succession indicated that the failed passing of the debt was often associated with some equitable arrangements. In this case, both the doctrine and the equitable approach lacked any formalization as they emerged in a diplomatic context. The doctrine was not acknowledged in the final text of the 1983 Vienna Convention on the Succession of States in Respect of State Property, Archives, and Debts. However, the indication of an equitable method to distribute assets and liabilities may operate as a Trojan horse to apply the doctrine in disguise. In this case, the doctrine still lacked formalization, but the equitable approach was formalized in broad and general terms.

The doctrine remained dormant until the end of the last century, when it re-emerged in connection with the Jubilee Campaign for debt reduction of poor countries and the settlement of the Iraqi debt following the second Gulf War. The re-emergence of the doctrine coincided with a reformulation pursuant to which it would apply to any kind of sovereign indebtedness irrespective of state or government succession. However, to be applicable in court the doctrine must be formalized. This point is highlighted by the Guiding Principles on Foreign Debt and Human Rights affirming that the odiousness or illegitimacy of a loan must be established by national legislations. Under common law jurisdictions, if a contract contravenes a statute is illegal and cannot be enforced. The result is that a claim for recovering sum transferred under the loan contract could be denied based on public policy. This outcome would refrain those countries sensitive to the reasons of the lenders, namely the United States and Great Britain, from formalizing the doctrine in their legal systems.

To overcome this impasse, the formalization of the doctrine should be complemented by an equitable rule based on the benefit for the population. Under this rule, the amount of loan to be repaid would be circumscribed to the portion applied to benefit the population. This formalization process would have two main consequences. On the one hand, the equitable method of settling disputes under state succession would become a proper rule based on a specific criterion. On the other hand, the benefit for the population would become not only a constitutive element of the doctrine, but also a measure for repayment. In this case, both the doctrine and the equitable approach would receive a thorough formalization.

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[186] *See* Ronan Feehily, *Separability in International Commercial Arbitration: Confluence, Conflict, and the Appropriate Limitations in the Development and Application of the Doctrine*, 34 ARB. INT'L 355–57 (2018) (showing that in the World Duty Free arbitration, the ICSID tribunal did not go so far as to declare the invalidity of the contract because of the non-separability doctrine between the underlying contract and the arbitral compromise).

[187] "To the extent that this invocation leads to an effective debt reduction, such enlarged odious debt doctrine will serve community interests", Reinisch, *supra* note 97, at 1235.

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